United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

corrected

To be argued by
DOUGLAS S. DALES, JR.

(101-E)

74-1911

B

P/S

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ROYAL STEUBING, 231 East Virginia Blvd., Jamestown, New York, CHAUTAUQUA COUNTY ENVIRONMENTAL DEFENSE COUNCIL, JOSEPH CATANIA, Drive-In Motel, Westfield, New York, ROBERT SEINDELL, 19 Chestnut Street, Jamestown, New York, JAMESTOWN AUDUBON SOCIETY, MARTIN OQUIST, Greenhurst, New York, JACK LLOYD, Greenhurst, New York, RICHARD MUDGE, 49 Peleison Street, Jamestown, New York, TROUT UNLIMITED, ALAN REPPENHAGEN, Silver Creek, New York, CHAUTAUQUA COUNTY FEDERATION OF SPORTSMEN, CHARLES MOHNEY, Bemus Point, New York, CHAUTAUQUA LAKE POWER BOAT CLUB,

Plaintiffs-Appellees,

v.

CLAUDE S. BRINEGAR, Secretary of Department of Transportation, 400 7th Street, S.W., Washington, D.C. 20590, RAYMOND T. SCHULER, Commissioner of New York State Department of Transportation, Albany, New York,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT-APPELLANT SCHULER

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Defendant-Appellant
Raymond T. Schuler

RUTH KESSLER TOCH
Solicitor General

DOUGLAS S. DALES, JR.
Assistant Attorney General

of Counsel

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
BATAVIA, N. Y. 14020
716-343-0457

R

TABLE OF CONTENTS.

CASES CITED.

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1911

ROYAL STEUBING, 231 East Virginia Blvd., Jamestown, New York, CHAUTAUQUA COUNTY ENVIRONMENTAL DEFENSE COUNCIL, JOSEPH CATANIA, Drive-In Motel, Westfield, New York, ROBERT SEINDELL, 19 Chestnut Street, Jamestown, New York, JAMESTOWN AUDUBON SOCIETY, MARTIN OQUIST, Greenhurst, New York, JACK LLOYD, Greenhurst, New York, RICHARD MUDGE, 49 Peleison Street, Jamestown, New York, TROUT UNLIMITED, ALAN REPPENHAGEN, Silver Creek, New York, CHAUTAUQUA COUNTY FEDERATION OF SPORTSMEN, CHARLES MOHNEY, Bemus Point, New York, CHAUTAUQUA LAKE POWER BOAT CLUB,

Plaintiffs-Appellees,

v.

CLAUDE S. BRINEGAR, Secretary of Department of Transportation, 400 7th Street, S.W., Washington, D.C. 20590, RAYMOND T. SCHULER, Commissioner of New York State Department of Transportation, Albany, New York,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT-APPELLANT SCHULER

Preliminary Statement

This is an appeal by the defendant Raymond T. Schuler, New York State Commissioner of Transportation, from an order of Honorable JOHN T. CURTIN, United States District Judge for the Western District of New York, dated May 20, 1974, which granted a preliminary injunction against further construction of a highway project in Chautauqua County. Defendant Claude S. Brinegar has also filed a notice of appeal.

Issue Presented

Did the District Court err, based upon the record before it, when it refused to apply the doctrine of laches and instead granted a preliminary injunction?

Decision Below

The District Court, on motion of the plaintiffs, confirmed the Report and Recommendation of the United States Magistrate sitting by order of reference as Special Master, and granted a preliminary injunction as follows:

> "A preliminary injunction against further construction of the Chautauqua Lake Bridge (parcel '5C') pending compliance with N.E.P.A. shall issue forthwith. Defendants may complete the driving of the five test pilings. If other work is necessary to shut the project down while the necessary environmental impact study is being made, the defendants may move upon notice for further relief.
>
> "So ordered."

Statement of the Case

Plaintiffs are eight individuals residing in Chautauqua County and three organizations[1] concerned with environmental matters who are challenging the State and Federal defendants' purported non-compliance with several federal laws concerning environmental protection in connection with a segment of the Southern Tier Expressway within the County.

Defendant Schuler is Commissioner of Transportation of the State of New York. As head of the New York State

[1] The Jamestown Audubon Society and the Chautauqua Lake Power Boat Club have withdrawn as plaintiffs.

Department of Transportation (NYDOT), he is responsible for the State's highway programs. Defendant Brinegar is Secretary of the United States Department of Transportation, responsible for the federal-aid highway programs through the Federal Highway Administration (FHWA).

The general route of the Southern Tier Expressway as defined by New York Highway Law, § 340-c, in 1962, runs from the Broome-Tioga County Line in New York State westerly to the Pennsylvania State Line, in the area of Erie, Pennsylvania. This litigation involves a portion thereof, in Chautauqua County, New York. At issue is a project for a bridge spanning Chautauqua Lake from the Hamlet of Stow on the west side to the Village of Bemus Point on the east side, denominated as project "5C".

The background of the suit is succinctly set forth in the District Court's Decision and Order (137a),* as follows:

> "On November 23, 1973, the plaintiffs commenced this action seeking to enjoin the defendants from continuing the construction of a bridge over Lake Chautauqua. Plaintiffs base their motion for a preliminary injunction on the theory that defendants have failed to comply with the requirements of the National Environmental Policy Act [N.E.P.A.], 42 U.S.C. § 4321, et seq., the Federal Aid Highway Act [F.H.W.A.], 23 U.S.C. § 101, et seq., the Clean Air Amendments of 1970, P.L. 91-604, 84 F. Stat. § 1676, and the Department of Transportation Act, as amended, 49 U.S.C. § 1651, et seq. Plaintiff's major allegations are that public hearings as required by the statutes were not held, that an Environmental

* References are to pages of Joint Appendix.

Impact Statement [E.I.S.] as required by Section 102(2) (C) of N.E.P.A. was not filed, and that a similar statement as required by Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 1653(f), and by 23 U.S.C. § 138, was not filed. Defendants generally deny the allegations and also set out various affirmative defenses, including an allegation that the action is barred because of laches.

"On January 17, 1974 an order of reference to United States Magistrate Maxwell was signed by United States District Judge John O. Henderson. The order of reference is as follows:

> "This matter having come on before this Court upon the application of plaintiffs for a preliminary injunction, and upon the motion of the defendant, Brinegar, for a hearing solely on the issue of laches and/or delay and the equitable considerations in connection therewith, and upon the agreement of the parties that such hearing is necessary, and good cause appearing therefor, it is
>
> "ORDERED: that this matter is hereby referred to United States Magistrate Edmund F. Maxwell, as special master, to hear and report with all due dispatch, the facts of this matter concerning the issues of laches and/or delay and the equitable considerations in connection therewith as they relate to the appropriateness of granting a preliminary injunction or dismissing this action.
>
> "Following Judge Henderson's death in mid-February 1974, the matter was referred to my part. Oral argument was heard on April 30, 1974 on confirmation of the Magistrate's report."

Following argument on confirmation of the Magistrate's report, a preliminary injunction was issued on May 20, 1974, barring any further construction on the project. By

order filed June 5, 1974 (155a), based on stipulation (152a), Judge CURTIN authorized the performance of work necessary to shut down the project, protect the terrain at the job site and protect the public. This appeal was taken on June 19, 1974 (157a).

At the hearing before the Magistrate, the defendants presented evidence in four major categories through seven witnesses and 32 exhibits.

First, the history of the Southern Tier Expressway, generally, and the sections in Chautauqua County, specifically, were traced from 1962 to the present. This aspect included testimony regarding the various required federal approvals sought and obtained at each stage of progression of the project, the then current status and the cost to date. Such evidence was presented in detail for the project sections within the County, running from west to east, as follows:

a) "5A"—Pennsylvania State Line to Sherman, 9.0 miles;

b) "5B"—Sherman to Stow, 10.0 miles;

c) "5C"—Stow to Bemus Point, 1.4 miles; and

d) "5D"—Bemus Point to Strunk Road, 6.1 miles.

Second, testimony was introduced regarding public notice of the project generally in Chautauqua County and specifically the bridge segment, "5C". This included correspondence, meetings, a public hearing, newspaper publicity, public documents, appropriation of right of way and demolition of buildings within the construction area.

Third, there was testimony regarding the cost which the State would incur from delaying the contract and the cost of cancelling and subsequently re-letting the contract were

the bridge project enjoined. Included in this aspect were the estimated additional expenses of the contractor from escalating labor and material costs and re-mobilization costs, potential delay claims against the State by the contractor and the loss occasioned by the acquisition of right of way, improved and unimproved, potentially unusable or substantially less usable.

Lastly, evidence was introduced demonstrating reliance by third parties upon the eventual completion of the Southern Tier Expressway, as planned and publicized, and potential injuries resulting therefrom.

All of the foregoing evidentiary matters are contained, in summary form, in the defendants' proposed Findings of Fact and Conclusions of Law (110a).

The District Court held that laches did not apply. It based this, *inter alia*, upon a finding that the date of the most recent PS&E approval,[2] May 9, 1973, determined when suit first could have been brought. It refused "as a matter of law, to give weight to either the total highway project or the private reliance upon the bridge's completion."

This, it is submitted, constituted error in light of the factual record before the Court.

---

[2] PS&E refers to approval of plans, specifications and estimates, a condition precedent to federal financial participation, pursuant to 23 U.S.C., § 106(a).

ARGUMENT

POINT I

The defendants' defense of laches should have been sustained.

A.

This appeal, as noted, is taken from the granting of a preliminary injunction following an evidentiary hearing relating to the defense of laches. The federal courts have continued to recognize the vitality of this eqiutable doctrine in environmental litigation. *Pennsylvania Environmental Council* v. *Bartlett*, 315 F. Supp. 238, aff'd 454 F. 2d 613 (3rd Cir. 1971); *Clark* v. *Volpe*, 342 F. Supp. 1324, aff'd 461 F. 2d 1266 (5th Cir. 1972); *Environmental Defense Fund* v. *TVA*, 468 F. 2d 1164 (6th Cir. 1972); *Life of the Land* v. *Volpe*, 363 F. Supp. 1171, aff'd 485 F. 2d 460 (9th Cir. 1973); *Harrisburg Coalition Against Ruin. Envir.* v. *Volpe*, 330 F. Supp. 918 (M.D. Pa. 1971); *National Defense Council, Inc.* v. *Grant*, 341 F. Supp. 356 (E.D. N.C. 1972); *Ward* v. *Ackroyd*, 344 F. Supp. 1202 (D. Md. 1972); *Centerview* v. *Brinegar*, 367 F. Supp. 633 (D. C.Cal. 1973); *I-291 Why? Association* v. *Burns*, 372 F. Supp. 223 (D. Conn. 1974).

While in only two of the above cited cases was laches found to exist (*Clark* v. *Volpe*, *supra*, and *Centerview* v. *Brinegar*, *supra*), in the other cases, the courts, nevertheless, did consider the defense.

Moreover, without using the term "laches", at least three federal courts have reached similar results. Thus, in *ECOS* v. *Volpe*, ____ F. Supp. ____, 5 ERC 1019, aff'd 486 F. 2d 1399, 5 ERC 2024 (4th Cir. 1973), the

plaintiffs sought to enjoin construction of 9.2 miles of controlled access highway running through Durham, North Carolina, claiming that only a draft EIS had been prepared. A 1.7 mile segment had already been completed and opened to traffic. A 1.9 mile segment was scheduled to be completed within a month after the suit was filed. An 0.8 mile segment had been under construction for three months to be completed within two years. The remaining segments were in various stages of preliminary design, although some right of way had been acquired. The court did require compliance with NEPA and the expanded hearing aspects of 23 U.S.C., § 128, and PPM 20-8, as to the entire project, but refused to enjoin construction of the 0.8 mile segment pending such compliance. In refusing to halt construction, it noted that virtually all the right of way had been acquired, property owners relocated, all structures within the right of way razed, clearing and grubbing 80% completed and all trees removed. Much of the steel for bridges had been cut and damages from delay would have amounted to several thousand dollars daily. Paramount in this determination was a finding that through compliance with the environmental and hearing requirements, "environmental improvements may be developed which can be implemented at the already established location of this segment."

Similarly, in *Environmental Defense Fund, Inc.* v. *Froehlke*, 348 F. Supp. 338, aff'd 477 F. 2d 1033 (8th Cir. 1973), the Army Corps of Engineers was permitted to continue construction of a flood control project along the Osage, Mississippi and Missouri Rivers, pending completion of an EIS. Factors taken into account were minimal environmental damage and independent economic benefit.

In *Jones* v. *Lynn,* 354 F. Supp. 433, rev'd 477 F. 2d 885 (1st Cir. 1973), the Court of Appeals granted an injunction after the District Judge had refused such relief, but nevertheless authorized the District Judge to release the injunction:

> "a. As to those parcels where completion is near or where such binding commitments to a specific structure and purpose have been made that changes in purpose, structure, or timing would work substantial injustice or public harm, the burden being on the defendants."

Finally, this Court, in *Greene County Planning Board* v. *FPC,* 455 F. 2d 412, cert. denied 409 U. S. 849 (2d Cir. 1972), enjoined a part of the Blenheim-Gilboa pumped power storage project, pending compliance with NEPA, but refused injunctive relief as to two transmission lines under construction which were 80% complete. In denying such relief, it is stated, at page 425:

> ". . . . It is of no small consequence that petitioners, having made timely motions to intervene, offered no objections to the construction of the two lines and did not petition this Court or the District of Columbia Circuit for review within 60 days as provided by Section 313(b) of the Federal Power Act, 16 U.S.C. § 8251(b). Thus, construction of the lines began pursuant to a *final* order of the Commission. Although we might arrive at a different conclusion if there were significant potential for subversion of the substantive policies expressed in NEPA, cf. *Calvert Cliffs',* 449 F. 2d at 1121 n. 28, the Commission did require PASNY in submitting its plans to 'give appropirate consideration to recognized guidelines for protecting the environment'[31] and also conducted its own independent investigation of alternative routings. . . ."
> [31 footnote omitted.]

Whatever the label appended, it is clear that the Federal Courts have considered unconscionable delay and prejudice

to the defendant in shaping injunctive relief. "Thus, the issue becomes, not whether laches can apply, but whether laches does apply under the facts of this particular case." *Clark* v. *Volpe*, 342 F. Supp. 1324, 1327, aff'd 461 F. 2d 1266 (5th Cir. 1972).[3]

Analysis of the record of this particular case dictates the conclusion that laches should apply.

Central to the issue of whether unconscionable delay has occurred, of course, is the matter of when suit first could have been brought. The District Judge relied, erroneously, it is submitted, on *I-291 Why? Association* v. *Burns*, 372 F. Supp. 223 (D. Conn. 1974), for the proposition that:

> ". . . . Plaintiff had no right, let alone obligation, to bring suit until the FHWA's sponsorship . . . reached the point of a 'proposal for . . . major Federal action' within the ambit of N.E.P.A., 42 U.S.C. § 4332(2)(C) . . ."

Compounding this, Justice CURTIN then equated such "proposal for . . . major Federal action" with the obligation of the FHWA to fund a given project, Plans, Specifications & Estimates approval (PS&E), citing *Monroe County Conservation Council, Inc.* v. *Volpe*, 472 F. 2d 693 (2d Cir. 1972).

The District Judge, in *I-291 Why? Association* v. *Burns*, *supra*, however, went on to conclude that ". . . plaintiff could have challenged defendants' compliance with NEPA once defendant Siccardi granted design approval to I-291 on November 6, 1972, *at which point I-291 became a proposal for major federal action.*" 372 F. Supp. 236. (Em-

---

[3] See also *Hanly* v. *Mitchell*, 460 F. 2d 640, cert. denied 409 U.S. 990 (2d Cir. 1972), and *Conservation Society* v. *Volpe*, 343 F. Supp. 761 [D. Vt. 1972].

phasis added). While there was some confusion[4] in this case whether "design approval" had occurred in October 1968, October 1969, or February 1971 (84a, 85a), this project had become a "proposal for major federal action" at least by the last date. As to the reliance placed by Judge CURTIN on the *Monroe County* case, *supra*, it should be noted that PS&E approval had not been requested by the State. In fact, the segment at issue there had progressed only to the stage where preliminary location plans had been approved and authority given the State to acquire right of way through the Genesee Valley Park land. Yet, this Court entertained the suit brought under basically the same federal statutes.

Moreover, if PS&E approval were the correct starting point from which to measure laches, as Judge CURTIN concluded, then the proper date was May 24, 1972, when PS&E approval was granted for two demolition contracts encompassing Sections "5B", "5C" and "5D". This work was completed in August 1972, and was in connection with the bridge approaches on both sides of the lake. Primarily, lake shore properties were involved, the scars of which were visible both from the lake and the roadside (Transcript, 59-66).

Clearly, then, suit could have been brought some time over a year before it actually was.

---

[4] Prior to January 14, 1969, when PPM 20-8 initiated a two hearing procedure (corridor hearing and design hearing), the Bureau of Public Roads' (now FHWA) procedures did not require a location or design report, nor was formal "design approval" required as is now the case per paragraph 6d(2) of PPM 20-8. States furnished preliminary plans, schematic drawings, design studies, layouts and reports to the BPR for review and comments prior to acquiring right of way, or preparation of detailed construction plans. This review and exchange of correspondence constituted "design approval" under procedures then followed. See *Conservation Society* v. *Volpe*, 343 F. Supp. 761 [D. Vt 1972].

Of course, laches would not apply unless plaintiffs were aware of these facts, and they were. As Judge BLUMENFELD pointed out in *I-291 Why? Association* v. *Burns, supra,* at page 239:

> "The 'unconscionable delay' requisite for successful assertion of the defense of laches 'can occur only after a party discovers or by the exercise of reasonable diligence could have discovered the wrong of which he complains.' *Ward* v. *Ackroyd*, 344 F. Supp. 1202, 1212 (D. Md. 1972). In the instant case, as in *Ward* v. *Ackroyd* (where FHWA compliance with 23 U.S.C. § 128 and PPM 20-8 was in issue), 'there is no evidence that plaintiffs *knowingly* sat on their rights and delayed bringing suit.' *Id.* (Emphasis in original.) . . ."

Unlike *I-291 Why? Association* v. *Burns, supra,* and *Ward* v. *Ackroyd,* quoted therein, there is an abundance of evidence "that plaintiffs *knowingly* sat on their rights and delayed bringing suit."

Thus, from July 9, 1964 to December 7, 1972, there were approximately twenty informal meetings with interested individuals and groups, some of which were attended by plaintiff Steubing, presently the vice-president of Chautauqua County Environmental Defense Council (Transcript, 43-46, 287). From February 1966 to December 1973, at least seventy-five newspaper articles appeared, at least two of which were authored by plaintiff Jack Lloyd (Transcript, 46-59). Right of way acquisition began in August 1968 for "5A", in August 1969 for "5B", October 1969 for "5C" and January 1969 for "5D", involving 338 parcels and 248 buildings (Transcript, 55-59). And, as already noted, demolition in the bridge area occurred during the summer of 1972 (Transcript, 59-66).

Additionally, plaintiff Steubing was advised in March 1972 by representatives of the State that it was their understanding that no EIS was required under current FHWA procedures, and that an Environmental Reevaluation sufficed (Transcript, 298-300). This view was echoed by the Environmental Protection Agency on June 7, 1972 in a letter to Dr. Robert W. Scott, a correspondent of plaintiff Steubing (Exhibit F-3). Lastly, the plaintiff Chautauqua County Federation of Sportsmen was represented by counsel in its efforts to halt the bridge project (Transcript, 301-305). Unquestionably, plaintiffs had adequate notice long before November 1973 that a bridge was in the offing and that both the State DOT and the FHWA considered the environmental prerequisites to have been satisfied.

B.

With respect to the second aspect of laches, whether prejudice to the defendants will result, little comment is necessary. As noted, the Court refused to consider the effect on sections "5A", "5B" and "5D" of enjoining "5C". The dollar amount of loss to the State is extremely large, even if limited to "5C". The error, it is submitted, is not in excluding from consideration additional dollar amounts of potential loss, but rather in failing to recognize that, for the most part, a segment of a highway project derives its utility from the parts to which it is connected. The connecting segments are vastly less futile if unconnected. Similarly, the bridge without connecting highway is of no value.

Moreover, were an EIS to be prepared now, no one would suggest that it could be limited to the bridge project, "5C", alone. The FHWA's PPM 90-1, in paragraph 6, provides:

> "The highway section included in an environmental statement should be as long as practicable to permit consideration of environmental matters on a broad scope. Piecemealing proposed highway improvements in separate environmental statements should be avoided. If possible, the highway section should be of substantial length that would normally be included in a multi-year highway improvement program."

The term "highway section" is defined in PPM 90-1, paragraph 3.a. as follows:

> "a. *Highway Section*—a substantial length of highway between logical termini (major crossroads, population centers, major traffic generators, or similar major highway control elements) as normally included in a single location study."

Obviously, the prejudice to both the defendants extends beyond the bridge project standing by itself. Logic compels, it seems, the conclusion that the prejudicial impact includes at a minimum the effect on the immediately surrounding projects. PPM 90-1 requires no less with respect to an EIS.

In that same vein, it is equally clear that "the private reliance upon the bridge's completion" is a material part of that prejudicial impact. Undoubtedly, the effect was substantial in terms of lost wages (Transcript, 139-146), public planning (Transcript, 172-210), public investment (Transcript, 97-98) and private investment (Transcript, 152-167; 227-247). Again, each of these areas would have to be examined were an EIS being prepared (PPM 90-1, Appendix E). Certainly, examination was warranted prior to imposing an injunction.

POINT II

A preliminary injunction should not have been issued.

In any case, the drastic remedy of injunctive relief was not warranted under the circumstances.

Factually, this case is very similar to *ECOS* v. *Volpe*, ____ F. Supp. ____, 5 ERC 1019, aff'd 486 F. 2d 1399, 5 ERC 2024 (4th Cir. 1973), discussed, *supra*, in Point I. All of the right of way has been acquired, property owners have been relocated, all structures within the right of way have been razed, clearing and grubbing has been completed and all trees removed (Transcript, 55-66, 99, 109-111, 117-118). At the time of the hearing, the "5C" project was approximately 20% completed (Transcript, 30). In short, all major physical changes to the environment have already occurred.

Moreover, extreme care has been taken to protect the environment during construction, including special procedures during dredging operations to eliminate siltation, a requirement that all waters returned to the lake be Class A quality and New York State Department of Environmental Conservation (ENCON) monitoring (Transcript, 73-75; Exhibit S-6, Supplemental Reevaluation, pp. 94-110, 129-130, 170-174).

In this regard, some clarification is necessary. The Decision and Order appealed from contains a portion of a letter from Jeffrey A. Lane, Program Associate, to Commissioner Parker of NYDOT, expressing the fear of ENCON that "The ecology of Chautauqua Lake could be disrupted both during and after construction. . . ." (149a). That letter was dated December 16, 1970.

On January 6, 1971, in another letter to the Commissioner, Mr. Lane had concluded:

> "Our investigations to date indicate that the major ecological impact of this project will probably be realized during, rather than after construction. The major areas of concern we are pursuing are 1) spoil removal methods and disposal, 2) effects of unavoidable siltation on the lake's ecology, and 3) practical means for mitigation." (Exhibit S-5, Environmental Reevaluation, Letter to Parker dated January 6, 1971).

By November 6, 1972, ENCON's "major areas of concern" had been allayed, as indicated by the following letter from Terence P. Curran, Director of Environmental Analysis, to Robert N. Kamp, Deputy Chief Engineer of NYDOT:

> "We have reviewed the subject project's revised contract specifications which you sent to us September 22, 1972. Our letter of June 21, 1972 to Mr. R. H. Edwards inadvertently omitted an additional restriction to be included in the special note on 'Pile Placement.' We recommend that pile driving be limited to Monday through Friday except for infrequent unforeseen circumstances. Therefore, the words 'Monday through Friday' should be inserted between '4:30 p.m.' and 'except when' in the Special Note.
>
> "Chautauqua Lake is classified as a Class A water. Therefore, the specification 'Item 905—Dredging, Disposal of Water' should indicate that water returned to the lake must meet Class A water quality standards.
>
> "With the exception of the two above noted items, the Special Notes on 'Docking Facilities for Construction Purposes,' 'Pile Placement' and 'Pollution' and Item 905 'Dredging' satisfy our major concerns. We concur with the revised contract specifications and therefore, we approve of this project as it is presently proposed.
>
> "We would appreciate being kept informed of progress with contract letting, contract specifications and preconstruction conferences.

"Thank you for the opportunity to review the revised contract specifications." (Exhibit S-6, Environmental Reevaluation Supplemental Report, page 131).

Finally, while Judge CURTIN correctly noted that no EIS had been prepared by the defendants, that fact should not, it is submitted, be critical (150a). Every applicable FHWA requirement was met by the State at each stage of progression of this project and FHWA approval obtained thereon. The State relied on the efficacy of such requirements in committing its resources to the project and in contracting for the construction of the substructure. Non-parties have relied to no less extent. If these FHWA procedures are deficient, and if, as a result, an EIS and expanded hearings will be required, still the circumstances of this case surely warrant, at a minimum, that construction be permitted to proceed while Court supervised compliance is underway. *ECOS* v. *Volpe*, ____ F. Supp. ____, 5 ERC 1019, aff'd 486 F. 2d 1399, 5 ERC 2024 (4th Cir. 1973); *Environmental Defense Fund, Inc.* v. *Froehlke*, 348 F. Supp. 338, aff'd 477 F. 2d 1033 (8th Cir. 1973); *Jones* v. *Lynn*, 354 F. Supp. 433, rev'd 477 F. 2d 885 (1st Cir. 1973); *Greene County Planning Board* v. *FPC*, 455 F. 2d 412, cert. denied 409 U. S. 849 (2d Cir. 1972).

Thus, it is submitted that the preliminary injunction should not have been granted.

CONCLUSION

The decision and order appealed from should be reversed. The complaint should be dismissed. In the alternative, the preliminary injunction should be dissolved.

Dated: August 13, 1974.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Defendant-Appellant
Raymond T. Schuler

RUTH KESSLER TOCH
Solicitor General

DOUGLAS S. DALES, JR.
Assistant Attorney General

of Counsel

UNITED STATES COURT OF APPEALS
For The Second Circuit

ROYAL STEUBING, et al,
Pltffs.-Appellees,
v.
CLAUDE S. BRINEGAR, et al,
Defts.-Applts.

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:
CITY OF ALBANY)

RoseMarie LaSala, being duly sworn, says:

I am over eighteen years of age and a Senior Stenographer in the office of the Attorney General of the State of New York, attorney for the Deft.-Applt.- Schuler herein.

On the 26th day of August 1974 I served the annexed Brief for Deft.-Applt. Schuler upon the attorney named below, by depositing one copy thereof, properly enclosed in a sealed, postpaid wrapper, in the letter box of the Capitol Station post office in the City of Albany, New York, a depository under the exclusive care and custody of the United States Post Office Department, directed to the said attorney at the address within the State respectively theretofore designated by him for that purpose as follows:

NORMAN J. LANDAU
233 BROADWAY
NEW YORK, NEW YORK 10007

Rose Marie LaSala

Sworn to before me this
26th day of August 1974

John E. Shea

JOHN E. SHEA
Notary Public, State of New York
No. 4509228
Qualified in Albany County
Commission Expires March 30, 19...

AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss.:
City of Batavia)

RE: ROYAL STEURING et al
v
DEPARTMENT OF TRANSPORTATION
Docket No. 74-1911

I, Roger J. Grazioplene being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 27 day of August, 1974 I mailed 2 copies of a printed Brief in the above case, in a sealed, postpaid wrapper, to: each of the following:

Asst. Attorney General
Appellate Division Section
Land & Natural Resources Division
Department of Justice
Washington, D.C. 20530

Attention: Eva Datz, Esq.

Richard J. Lippes, Esq.
800 Western Building
Buffalo, New York 14202

John T. Elfvin
U. S. Attorney
502 U. S. Courthouse
Buffalo, New York 14202

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

Nicholas L. Sullivan, Managing Attorney

State of New York, The Capitol, Albany, New York 12224

Roger J. Grazioplene

Sworn to before me this

27 day of August, 19 74

Monica Shaw

MONICA SHAW
NOTARY PUBLIC, State of N.Y., Genesee Count
My Commission Expires March 30, 19 75